IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1686

JAMES BROWN HARDY, Acting Warden of the Maryland State Penitentiary, *Petitioner,*

v.

MILAN M. VUITCH, M.D., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari and suggests that the Petition has been rendered moot by the June 30, 1972 judgment of the United States District Court for the District of Maryland in this cause declaring unconstitutional the statute under which Respondent had been convicted in state court and granting Respondent's application for a writ of habeas corpus.

CITATION TO OPINION BELOW

In addition to the opinions and orders cited by Petitioner, a further opinion by the United States District Court for the District of Maryland, issued June 22, 1972, has important bearing upon the Petition and is set out in the Appendix, *infra*, at 1a.-13a.

QUESTIONS PRESENTED

1. Whether this Petition to review the Court of Appeals' order granting federal post-conviction bail to Respondent has been made moot by a subsequent order of the District Court granting the writ of habeas corpus and declaring unconstitutional the statute under which Respondent had been convicted and sentenced to imprisonment.

2. Whether, in any event, the Petition is totally lacking in merit, since a question of bail, when granted, is peculiarly one of discretion for the courts, state or federal, in the jurisdiction involved.

STATEMENT OF THE CASE

In addition to the facts set out by Petitioner, one event has occurred which moots this appeal. Although the District Court on February 17, 1972, denied bail, that same Court subsequently, on June 30, 1972, granted this Respondent full relief on the merits, declaring the convicting part of the Maryland Therapeutic Abortion Act unconstitutional, and issuing the writ of habeas corpus. *Vuitch* v. *Hardy,* Civ. No. 71-1129-Y (D.Md.1972); Appendix 1a. Petitioner noticed an appeal from the judgment of the District Court on July 3, 1972.

ARGUMENT

The Petition is moot in that the Court of Appeals' order granting bail prior to a determination by the District Court of the merits has no further force and effect since Respondent, the bail-applicant, fully prevailed on the merits and obtained the requested writ of habeas corpus vacating the conviction under which Respondent was sentenced, thereby eliminating the need for bail.

The relief sought by Petitioner in this Court could not possibly be granted, as "there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez,* 177 U.S. 378, 390 (1900). Petitioner asks this Court to overturn the order of the Court of Appeals admitting Respondent to bail pending a decision by the District Court for Maryland on a petition for habeas corpus. Shortly before this Petition was filed, however, the District Court granted the writ of habeas corpus, and declared unconstitutional a restrictive provision in the Maryland Therapeutic Abortion Act. *Vuitch* v. *Hardy,* Civ. No. 71-1129-Y (D. Md. 1972); Appendix 1a. Accordingly, any judgment by this Court would lack subject matter on which to operate. Respondent does not now need bail, because his jail sentence in state court has been vacated by a decision that the convicting statute was invalid.

Similarly, a judgment in favor of Petitioner would be useless, unless Petitioner should ultimately prevail on its appeal of the District Court decision on the merits to the Court of Appeals, and then fail to persuade the Court of Appeals that bail pending a petition by Respondent to this Court should be withheld. "But such speculative contingencies afford no basis for . . . passing on the substantive issues . . . ." *Hall* v. *Beals,* 396 U.S. 45, 49 (1969). To have effect, a judgment by this Court would be contingent on the occurrence or non-occurrence of not just one, but several factors. Such a judgment, even if it could be formulated, would constitute precisely the type of advisory opinion forbidden by Article III.

In any event, the Petition is wholly lacking in merit and should be denied even if the case were not moot. A decision *granting* bail, unlike one which denies bail

and thus deprives someone of his liberty, is a discretionary one peculiarly for local courts, whether state or federal. The exercise of the court's discretion will vary from case to case. Here, for example, Respondent had long-standing family, professional and community ties; he had received bail all the way through the state courts and had violated no conditions thereof; there was no suggestion in the record or by the State that he was anything but an excellent bail risk; and the substantiality of his constitutional claims was demonstrated by the District Court judgment in his favor on the merits. The exercise of discretion to grant bail in such a case is hardly a matter of national importance requiring this Court's attention.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. 71-1129Y

MILAN M. VUITCH, M.D.,
Petitioner

v.

JAMES BROWN HARDY,
Acting Warden of the Maryland State Penitentiary,
Respondent

Judgment

In accordance with the Memorandum Opinion and Order dated June 22, 1972, filed in the above case, it is

ORDERED AND ADJUDGED:

(1) That Petitioner's application for the issuance of a Writ of Habeas Corpus is hereby granted.

Dated at Baltimore, Maryland this 30 day of June 1972.

PAUL R. SCHLITZ,
Clerk of Court

By (Illegible)
Deputy Clerk

Filed June 30, 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. 71-1129-Y

MILAN M. VUITCH, M.D.,
Petitioner

v.

JAMES BROWN HARDY,
Acting Warden of the Maryland State Penitentiary,
Respondent

Memorandum Opinion and Order

Milan M. Vuitch, M.D., brings this petition for habeas corpus following his conviction in the Circuit Court for Montgomery County, Maryland, for violation of Article 43, § 139 of the Maryland Code Annotated. That section provides, in part, that a person is guilty of a misdemeanor if he performs a therapeutic abortion in any facility other than "a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene. . . ." Following a trial before the Honorable Ralph G. Shure, petitioner was sentenced, on November 18, 1969, to serve a term of three years in prison, two of which were suspended, and to pay a fine of $5,000. Petitioner sought unsuccessfully to raise the issue of the constitutionality of the statute in the state courts, and this Court, having previously determined that petitioner has sufficiently exhausted his state court remedies,[1] now turns to a consideration of that issue.

I.

At the outset, in the interest of more clearly delineating the constitutional question presented, certain issues

[1] Order filed February 17, 1972.

which are not relevant to the present inquiry should be emphasized.

First, the reasons for which a woman is statutorily permitted to seek an abortion[2] are not relevant here, and this Court expresses no opinion as to the constitutionality of

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[2] No criminal penalties are provided for violation of Article 43, § 137, of the Maryland Code ("conditions under which termination of pregnancy permitted; records and reports."). The Maryland statute thus appears to be distinguishable from those involved in the cases cited at note 3, *infra*.
Section 137 provides:

> (a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:
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> (1) Continuation of the pregnancy is likely to result in the death of the mother;
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> (2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;
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> (3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
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> (4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.
>
> (b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termina-

the statutory limitations on those reasons.[3] Neither is the statutory protection in § 138 of hospitals and medical personnel from civil liability for refusal to perform an abortion at issue here.

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tion of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant to subsection (a)(1) or where the fetus is dead);

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereon. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted.

[3] Compare, e.g., *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Texas 1970); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970); *Doe v. Scott*, 321 F. Supp. 1385. (N.D. Ill. 1971); *United States v. Vuitch*, 402 U.S. 62 (1971); *Y.W.C.A. v. Kugler*, ... F. Supp. ..... (D.N.J. Feb. 1972); *Abele v. Markle*, ... F. Supp. ..... (D. Conn. Apr. 1972), which held statutory limitations on the reasons for which a woman might obtain an abortion invalid. Cf. *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970); *State v. Abodeely*, 179 N.W. 2d 347 (Iowa, 1970); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio, 1970); *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971), which upheld such statutory limitations.

Second, the propriety or wisdom of petitioner's conduct in this particular case should not be relevant to a determination of the validity of the statute under which he was indicted and convicted. The Court has found nothing in the record that clearly precludes the possibility that at the time of the arrest Dr. Vuitch was in fact operating an "abortion mill," and if that were the case, his practices would surely deserve our strongest censure. However, that possibility is not controlling here, nor is the fact that Dr. Vuitch did not attempt in this case to perform the abortion in a licensed, accredited hospital, for if the statute under which he was indicted and convicted is unconstitutional on its face then the petition for habeas corpus must be granted. See *Eisenstadt v. Baird*, ... U.S. ....., 31 L. Ed. 2d 349, 92 S.Ct. 1029 (March 22, 1972).[4]

II.

Petitioner argues that a woman has a constitutionally protected "fundamental personal right" to seek an abortion, that any restriction by the State of that right must, therefore, be supported by a "compelling state interest" and must also be shown to be necessary in that there are no other reasonable alternatives open to the State which would promote that interest and which would entail less of a burden on the woman's exercise of her rights. Petitioner argues that a less restrictive and still reasonable alternative to the hospitalization requirement embodied in Article 43, § 139, is in fact available to the State—i.e. restricting the performance of abortions to specially licensed facilities in addition to hospitals. Petitioner has supported his argument with numerous affidavits and exhibits which tend to show that there is wide-spread agreement among the medical profession that hospitalization is not generally neces-

[4] The *Eisenstadt* decision, and its predecessor *Griswold v. Connecticut*, 381 U.S. 479 (1965), also establish that petitioner has standing here to assert the constitutional rights of his patients and potential patients.

sary for performances of abortions in the first trimester of pregnancy;[5] that state-regulated clinics which perform abortions have been found to be safe and easily regulated in other states;[6] and that many Maryland women have been induced to seek abortions in other states because of the costs and scheduling delays attendant upon the requirement that abortions in Maryland be performed in licensed, accredited hospitals.[7]

The State implicitly denies that a woman has a "fundamental personal right" to seek an abortion by basing its arguments on the existence of a "reasonable basis" for the legislative determination that abortions should only be performed in licensed, accredited hospitals. In support of this argument the State also has submitted affidavits and exhibits, which tend to show that a number of leading specialists in obstetrics and gynecology feel that abortions should be performed in hospitals because of the possibility of complications;[8] that abortions in Maryland have been at least as accessible to non-private patients as to private patients;[9] and that only two hospitals in the State which provide obstetrical and gynecological services are not accredited by the Joint Commission on Accreditation of Hospitals.[10]

If a woman does not have a "fundamental personal right" to seek an abortion, then the requirement that the abortions be performed in a hospital might be upheld; the State's interest in protecting the woman from the possi-

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[5] See, e.g. Petitioner's affidavits 1-4, 8, 10-15.

[6] Petitioner's affidavits 2, 8, 10-15.

[7] Petitioner's affidavits 5, 6.

[8] Respondent's affidavits 1, 3, 4, 6, 7, 8, 17.

[9] Respondent's affidavit 4.

[10] Respondent's affidavit 5.

bility, however remote, of complications following abortion probably satisfies the minimal requirements of a "reasonable basis" for the legislation.[11] *Dandridge v. Williams*, 397 U.S. 471 (1970). However, this Court is convinced that a woman does have a constitutionally protected, "fundamental personal right" to seek an abortion. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra*, 31 L.Ed. 2d 349, 362, 92 S.Ct. 1029, 1038. (Emphasis deleted.) Our inquiry, therefore, turns to the questions of whether Maryland has a "compelling state interest" which is being promoted by the hospitalization requirement and whether no "other, reasonable ways to achieve those goals with a lesser burden on

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[11] The Court would have considerably more difficulty in finding a "reasonable basis" for that portion of the statutory requirement that demands that abortions be performed in a hospital that has been accredited by the Joint Commission on Accreditation of Hospitals. In the first place, the affidavit (No. 9) of the member of the Joint Commission, submitted by petitioner, establishes that accreditation by the Commission is granted or withheld entirely without regard to the particular hospital's policy on abortions, and this is not contradicted by the State. In the second place, if the high level of safety and competence which may be inferred from the fact of accreditation forms the "reasonable basis" for the legislation, it is hard to understand how the State can justify sanctioning the existence of *any* unaccredited hospital in the State, in view of the undisputed fact that almost all other surgical procedures present a greater mortality and morbidity risk to the patient. If a woman were held not to have a fundamental personal right to seek an abortion, this lack of a "reasonable basis" for the accreditation requirement would constitute an alternative ground for granting the petition since the accreditation requirement is an integral part of the statute under which Dr. Vuitch was convicted. However, in view of the Court's belief that the existence of a "reasonable basis" for the statutory requirement will not suffice to support its validity, it is not necessary to decide this point.

constitutionally protected activity," *Dunn v. Blumstein*, ... U.S. ....., 31 L.Ed. 2d 274, 285, 92 S.Ct. 996, 1003 (March 21, 1972), are open to the State.

III.

Ordinarily the first possible "compelling state interest" which comes to mind in connection with abortion legislation is the protection of the rights of the fetus. However, in this case it is unnecessary to decide whether this interest is sufficiently compelling to justify the statutory limitation on constitutionally protected activity, for it is clear that that interest is not being promoted by the statutory provision under consideration; the fetus cannot be said to have an interest in being aborted in a hospital rather than elsewhere.

On the other hand, protection of the health of its citizens has always been considered to be a strong state interest, e.g., *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908), *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), and there is clearly a rational connection between that interest and the hospitalization requirement which is being attacked here. Abortion is a surgical procedure and obviously affects the patient's health. However, the Court believes that reasonable alternatives have been shown to exist which would entail less of a burden on the exercise of constitutional rights.

As Justice Marshall said in the recent case of *Dunn v. Blumstein, supra:*

> Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' . . .

Petitioner has shown, and this Court finds as a fact, that the requirement that abortions be performed only in licensed, accredited hospitals does place some burden on Maryland women's rights to seek an abortion, that that burden would be lightened by permitting abortions to be performed in other facilities as well, and that the experience of other states has proved that, with appropriate regulation, facilities other than hospitals can and do protect the health of the women seeking an abortion as adequately as hospitals do. The Court believes that regulation of these alternative facilities is perfectly feasible; the affidavit of Dr. Seegar, the Chief of the Maternity and Family Planning Section, Division of Maternal and Child Health, Maryland State Department of Health and Mental Hygiene, is particularly persuasive.[12] Indeed, it has also been pointed out that specialized abortion facilities might be more susceptible to regulation than hospitals in their abortion practices, for not only would such facilities' abortion practices be more visible, but the State might also be less hesitant to revoke such a facility's license than to revoke a hospital's license. A wide variety of alternatives are open to the State in protecting the health of the woman seeking abortion. Simply by way of illustration: it may require licensure by clinics and conformity by those

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[12] Petitioner's affidavit No. 7, p. 3, para. 6-7:

> It is my opinion that the State Department of Health and Mental Hygiene is fully capable of establishing and administering regulations less restrictive than mandatory hospitalization for licensed non-hospital facilities, located near hospitals, which could provide safe and less expensive first trimester pregnancy termination.
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> . . . Administratively, there appears to me to be no reason why an adequate non-hospital licensed facility cannot be regulated as well as a hospital insofar as a therapeutic abortion program is concerned. In both cases the same types of forms for statistical purposes can be utilized, filled out by attending physician and assistants, and designed to ensure compliance with the law.

clinics to administrative regulations as a condition of licensure; it may permit the medical profession to make a free decision as to hospital, clinic or office for performance of abortions in each particular case, as it now does with regard to other types of patients and procedures; it may require that only specialists in obstetrics and gynecology perform abortions, or it may allow any licensed practitioner to perform them, or even specially-trained para-medical personnel under appropriate supervision; it may require that abortions only be performed in facilities which have a "back-up" arrangement with a nearby hospital in case of complications, as is apparently a requirement in other states;[13] it may require that the doctor or doctors who use the facility have staff privileges at the back-up hospital so as to preserve continuity of patient care.[14] These alternatives, which have in many cases been shown by experience to be feasible, would surely involve less of a burden on the exercise of a woman's right to seek an abortion, for it is impossible to doubt that it is far easier to establish a clinic or other facility limited to one specialized procedure than to establish an entire hospital, and the greater the number of adequate facilities available the smaller the burden on the exercise of the right. And it may be possible for the state to put many of the controls into effect by regulation of the Department of Health and Mutual Hygiene, without the necessity of further legislative action.

There is one other possible "compelling state interest" which should be discussed, although the State has not suggested it: Maryland may have a legitimate interest in regulating the conduct of medical practitioners who per-

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[13] E.G. New York, Washington; the Court is particularly impressed with the Washington State Board of Health's regulations, found at pp. 17-22 of Petitioner's Exhibit D.

[14] This enumeration of alternatives is in no way intended to be exhaustive, and this Court expresses no opinion as to the wisdom or constitutionality of any particular alternative.

form abortions. It is common knowledge that, at least prior to the 1968 revision of Maryland's abortion laws, abortions were, occasionally or frequently, performed illegally, by persons of questionable competence and under questionable hygenic conditions. It may be that some Maryland women, perhaps under the impression that anonymity will be better preserved, seek out certain of these practitioners who may charge very high fees for their alleged services; at least Maryland would be justified in taking some measures in response to that possibility. If control of medical practitioners who perform abortions were the "compelling state interest" which the statute was designed to promote, then the accreditation requirement also could be justified as promoting that interest, since the exhibits submitted in this case show that the quality and frequency of peer review is one of the criteria by which the Joint Commission makes its decisions on accreditation.

But here again the requirement that there be no other reasonable method of promoting the State's interest which involves less of a burden on constitutionally protected activity cannot be met. Maryland already has a strong statute, Article 43, § 130, Annotated Code of Maryland, regulating the professional conduct of physicians; it empowers the Commission on Medical Discipline, part of the State's Department of Health and Mental Hygiene, to take action against a physician for any one of nineteen reasons, including willful misrepresentation in treatments, gross, willful and continued overcharging for professional services, willful omission to file reports required by law, and professional incompetency. In regulations governing licensed facilities, or even by statutory provision, the State may set maximum fees for termination of pregnancy or take such other steps as it deems necessary to protect against the legacy of illegal abortions. And if the state wishes to guard against the performing of abortions by non-medical practitioners, it may prosecute such people

for practicing medicine without a license. See, e.g., *Rock v. State*, 6 Md. App. 616 (1969).[15]

IV.

Various arguments presented by the State remain to be considered.

It is argued that, although the medical profession may now be in substantial agreement on the safety of clinical abortions in the first trimester of pregnancy, no such agreement existed in 1968 when Dr. Vuitch performed the abortion which was the basis for his prosecution, and that, therefore, the use of 1972 statistics constitutes some sort of "bootstrap" argument. The State's argument mistakes the nature of the Great Writ, for it is not alleged that clinical abortions actually *were* unsafe in 1968—only that the medical profession had not at that time recognized their safety. It would be manifestly unfair to require Dr. Vuitch to serve a prison term solely because he may have recognized a fact which many of his colleagues had not.

The State contends that the decision on the proper location for performance of abortions is a matter of judgment, that its medical affidavits show that the decision to restrict the proper location to licensed, accredited hospitals is not an unreasonable judgment, and that the most appropriate institution to make that judgment is the legislature and not the court. The short answer to this argument is that Federal constitutional rights are involved, and that Federal Courts have an affirmative duty to make independent judgments in such cases. By making an independent judgment in this case as to the Federal constitutional rights, the Court intends to leave the medical profession and the legislature free to exercise their judgment in their respective fields of expertise.

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[15] One court, at least, has also suggested that the State may prosecute those who perform abortions under the common law, which made it a crime to perform an abortion on a woman who was more than three months pregnant. *Y.W.C.A. v. Kugler*, *supra*.

It is also argued by the State that this Court should abstain from a decision in this case because another prosecution against Dr. Vuitch is currently pending in the state courts in which Dr. Vuitch has raised, this time in proper form, the same constitutional issues as are presented here. However, the doctrine of abstention is inappropriate in this case. Federal courts will abstain from deciding a dispute when it could be resolved by determination of a previously undetermined point of state law; they will not abstain when the undetermined issue is solely one of Federal constitutional rights. The state statute in this case, although largely uninterpreted by the state courts, is quite unambiguous, and the only issue raised is its constitutionality. In such cases the Federal courts have a positive duty not to abstain. *Baggett v. Bullitt,* 377 U.S. 360 (1964).

Finally, the State argues that there is no showing that any Maryland woman has been absolutely unable to obtain an abortion in Maryland. But no such showing is necessary. As the Supreme Court noted recently in *Dunn v. Blumstein, supra,* it is not necessary to show that the legislation actually and totally deterred the exercise of a constitutional right; it is enough that the legislation is shown to have placed an unnecessary burden on the exercise of the right, and that showing has been made here. The validity of Article 43, § 139, cannot be upheld in the face of such a showing.

Therefore, it is this 22nd day of June, 1972, by the United States District Court for the District of Maryland, ORDERED:

1. That the petition for a writ of habeas corpus be and it is hereby granted; and

2. That the Clerk mail a copy of this Memorandum Opinion and Order to petitioner, to Roy Lucas, attorney for petitioner, and to Francis X. Pugh, Assistant Attorney General of the State of Maryland.

JOSEPH H. YOUNG
United States District Judge